No. 17,310

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, a corporation d/b/a SOUTH BAY DAILY BREEZE, *Respondent.*

RESPONDENT'S PETITION FOR REHEARING.

O'MELVENY & MYERS,
CHARLES G. BAKALY, JR.,
433 South Spring Street,
Los Angeles 13, California,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 17,310

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, a corporation d/b/a SOUTH BAY DAILY BREEZE, *Respondent.*

RESPONDENT'S PETITION FOR REHEARING.

To the Honorable Stanley N. Barnes, Charles M. Merrill and James R. Browning:

Respondent hereby petitions this Honorable Court for a rehearing with respect to its decision of January 5, 1962.

Grounds for This Petition.

1. This Court in its opinion now indicates that it did not consider Clark's reason for refusing to accept the better position. It is respectfully submitted that this Court erred by so refusing to consider such fact and had it done so this Court would have decided that Respondent's offer to Clark of a more desirable position was not a "discrimination" within the meaning of Section 8(a)(3) of the Act.

The Trial Examiner made evidentiary findings, which were adopted by the Board, that Respondent's conduct consisted of offering Clark the type of position he, Clark, had been trying to obtain.* Moreover, it was

---

*This Court stated in its decision that ". . . the total pay [for the new position] was no greater than that which he had

found that had he accepted the new position, Clark would still have been performing work within the jurisdiction of the Union. It was further found that Clark declined the new position because the prospects of obtaining a still better job in Los Angeles, which had been promised by the Union if he lost his job through no fault of his own, seemed more attractive, and that Clark invented his objections to the new position offered by Respondent for the purpose of convincing the Union that he was justified in refusing the job and leaving Respondent, thereby requiring the Union to perform its promise of better employment in Los Angeles.*

This Court concurred in the findings described above. However, this Court held that the offer to Clark of the very type of job he had been seeking was a "discharge" because the offer was made in the form of an ultimatum and because the offer was made for an anti-Union purpose. By characterizing Respondent's conduct as a discharge, this Court cast an enormously prejudicial pall over the facts as developed in the record, which,

---

been receiving (if anything, it was less) . . ." If the Court based its decision on this statement it erred because the amount of total pay received in the new position is not relevant under the circumstances in view of the fact that the hourly rate of pay was higher and Clark had wanted a job that entailed fewer hours; almost by definition the type of job Clark himself was attempting to obtain would almost certainly result in some decrease of his total pay. Moreover, the record itself is unclear as to the total pay Clark received per week as a fly boy because the number of hours worked varied. The Trial Examiner found that ". . . the trainee job offered to David by Collins was a better job at *increased pay* and that it was the type of job David and his father had been trying to get for David with Respondent." (Emphasis added.) [R. 15.] Moreover, it is undisputed that Clark did not decline the new position because the total pay was less than he had been receiving.

*This Court stated in its decision that Clark stated to Collins ". . . that he elected to continue as fly boy." This statement is inconsistent with the Trial Examiner's findings that Clark declined the new position in order to obtain the better employment in Los Angeles which the Union had promised. [R. 17.]

together with this Court's refusal to concern itself with Clark's reason for refusing to accept the new job, thereby caused an erroneous finding of "discrimination".

It is respectfully submitted that the instant case is directly analogous to a case where an employer mandatorily transfers an employee to another position within the bargaining unit and the employee quits rather than accept the new position. Such mandatory transfer is no different from the "ultimatum" given Clark in the instant case. However, such mandatory transfer has been construed by the Board as a discharge only if there was some rational relationship between the employer's conduct and the employee's leaving.* Under such circumstances the employee's reasons for not accepting the new job are extremely relevant. It is respectfully submitted that had this Court considered more fully Clark's reason for refusing to accept the more desirable job it would have found, as did the Trial Examiner, that Clark, in seizing upon this opportunity to leave Respondent's employ for greener pastures, had in fact quit, and that there was no rational relationship between Respondent's conduct and Clark's leaving. But for Clark's voluntary decision to accept the Union's offer of better employment in Los Angeles, he would still be employed by Respondent and would still be able to be represented by the Union.

2. In the context of the facts as set forth in the record, this Court could not reasonably have inferred that Respondent's conduct tended to have the effect of discouraging Union membership within the meaning of Section 8(a)(3) of the Act.

The Act makes conduct unlawful only if it has the effect of discouraging union membership. The Trial

---

**Greenville Cabinet Co.,* 102 NLRB 1677, 1705 (1953); *Empire Pencil Co.* 86 NLRB 1187, 1194 (1949).

Examiner found that Respondent's conduct did not tend to discourage Union membership, but in fact would "if anything provide an example for encouraging Union membership." [R. 19.] This Court apparently agreed with the Trial Examiner that the conduct of Respondent did not have the effect upon Clark or upon any of the persons who were its employees on December 21, 1959, of discouraging Union membership.* Rather, it was a prospective fly boy** whom this Court inferred would be discouraged from Union membership.

It is respectfully submitted that such an inference is not a reasonable one in view of the evidence before the Trial Examiner and the Board. Shortly after Clark left his employment with Respondent, John Rinde was employed as a trainee and commenced his employment by performing the duties of the fly boy position. [R. 291, 306.]*** The Trial Examiner who heard and observed the witnesses did not infer that John Rinde was discouraged in Union activities by Respondent's conduct with respect to Clark. This Court, however, inferred that a prospective fly boy who was unqualified for the position of district manager would be discouraged in his Union activities by Respondent's conduct toward Clark, presumably because he would believe that if he joined the Union he would be discharged. It is respectfully submitted that the situation envisaged by this Court is im-

*This Court stated that "The area within which we are concerned, with discouragement of Union membership, is not the district manager's job; it is the job of fly-boy."

**Inasmuch as the evidence was undisputed that Clark was the only fly boy, when this Court referred to the effect upon an "unqualified flyboy" it must have been referring to a prospective boy.

***The finding of the Board, which was recited by this Court in its opinion, to the effect that Respondent was required temporarily to assign Clark's work to other employees for over a

possible of occurrence due to the trainee program which has, since December 19, 1959, prevailed in Respondent's mailroom because a fly boy unqualified for the position of district manager would be discharged irrespective of his Union activity. Under this trainee program the fly boy is in fact a trainee district manager, and according to long established practice in the newspaper business a trainee or apprentice may be discharged at any time if he is unqualified for promotion. Further, it cannot even reasonably be inferred that Respondent's conduct with respect to Clark would be communicated to a prospective fly boy in such a way as to discourage Union activity inasmuch as none of the other employees of Respondent were so discouraged.

This Court seems to have found an unfair labor practice to have been committed because it found that the Respondent believed that its fly boy should not belong to a Union. However, such a position standing alone is not unlawful. Many non-union employers have such a belief. It is only where such position is implemented by conduct which tends to discourage union activity that the position and conduct becomes unlawful. It is respectfully submitted that in the instant case the conduct of Respondent was not such as to discourage Union activity on the part of any of its employees.

Conclusion.

For the reasons hereinabove stated Respondent requests that this petition for a rehearing be granted, and that the Court, upon re-examining the case in light of the considerations set forth above, enter a decree denying enforcement of the order of the Board.

Dated: February 1, 1962.

Respectfully submitted,

O'Melveny & Myers,
Charles G. Bakaly, Jr.,
Attorneys for Respondent.

Certificate of Counsel.

CHARLES G. BAKALY, JR., counsel of record for Respondent, certifies that he has prepared the contents of the foregoing Respondent's Petition for Rehearing and that in his judgment said petition is well founded and that it is presented in good faith and is not interposed for purposes of delay.

CHARLES G. BAKALY, JR.,
Attorney for Respondent.